

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : **CR-1801-2005**
 :
 :
 v. :
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 :
 DAVID ROGER PROBST, :
 Defendant : **PCRA**

OPINION AND ORDER

I. Background

On November 1, 2006, a jury found the Defendant guilty of Indecent Assault¹, Endangering the Welfare of a Child², and Corruption of Minors³. On March 4, 2007, the Court sentenced the Defendant to a period of incarceration of seven (7) to twenty-three (23) months on the Indecent Assault and on the Endangering the Welfare of a Child charge, a concurrent sentence of seven (7) to twenty-three (23) months.

On the Corruption of Minors charge, the Court sentenced the Defendant to probation for a period of three (3) years to run consecutively to the indecent assault sentence. The Defendant was paroled on January 25, 2008. While the Defendant was on probation, he committed another crime for which he received a state prison sentence. See Order filed on November 23, 2010 (ordering that no further action be taken in the probation violation matter).⁴

On September 9, 2015, the Defendant filed a PCRA petition, stating that he was eligible for relief due to the unavailability at the time of trial of exculpatory evidence that

¹ 18 Pa.C.S. § 3126(a)(7).

² 18 Pa.C.S. § 4304.

³ 18 Pa.C.S. § 6301(a)(1).

⁴ AND NOW, this 15th day of November, 2010, after being advised that the Defendant has received a lengthy state prison sentence in his new case, it is hereby Ordered and Directed that no further action be taken in the Probation Violation matter pending in his case...

has subsequently become available and would have changed the outcome of the trial if it had been introduced: the sentencing of Eugene H. Parmenter in CR-786-2011, where Parmenter's wife allegedly stated "We now know we got the wrong guy four (4) years ago, it was my husband who did this crime". Through an order filed on September 28, 2015, the Court appointed PCRA counsel. The Court instructed PCRA counsel to "address PCRA eligibility and timeliness" in his filing. On October 22, 2015, PCRA counsel filed a Turner/Finley "no merit" letter. PCRA counsel asserted that the Defendant's PCRA is without merit because the Defendant was paroled on January 25, 2008. PCRA counsel also asserted that the Defendant's sentence has been fully satisfied. On December 21, 2015, PCRA counsel filed a "Motion to Withdraw as Counsel." In an Opinion and Order filed February 16, 2016, this Court requested PCRA counsel to address the issue of whether Defendant was serving his probation sentence for Corruption of Minors and therefore possibly eligible for relief under the Post Conviction Relief Act. In a Turner/Finley letter filed May 2, 2016, PCRA Counsel posited that even if Defendant's probation sentence did not expire in 2012, Defendant's request for relief is still untimely as it was not filed within 60 days of the time he could have learned of the potentially exculpatory statement above.

II. Discussion

"[T]he timeliness of a PCRA petition is a jurisdictional requisite." Commonwealth v. Brown, 111 A.3d 171, 175 (Pa. Super. 2015). Any petition under [the PCRA] . . . shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S. § 9545(b)(1).

Additionally, any petition invoking an exception above shall be filed within 60 days of the date the claim could have been presented. 42 Pa.C.S. § 9545 (b)(2).

Petitioner did not file the instant PCRA Petition, until September 9, 2015, more than eight (8) years after his conviction in 2007, and more than six (6) years after his judgement became final. Defendant was sentenced on March 1, 2007. The Order of Sentence was amended on March 21, 2007. Defendant did appeal to the Superior Court from his order of sentence. In an opinion and order filed March 20, 2009⁵, the Superior Court affirmed the judgement of sentence in part and reversed in part: The Superior Court reversed the sentencing order requiring Defendant to pay the costs of victim's counseling. Defendant did not petition the Supreme Court for an allowance of appeal and as such, his order of sentence became final on April 20, 2009. "[A] judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." 42 Pa.C.S. § 9545(b)(3).

⁵ Commonwealth v. David Probst, No. 690 MDA 2007 (Pa. Super 2009).

The Court finds that the Defendant with due diligence could have raised this issue earlier than 2015. The Exhibits Defendant included in his PCRA petition, show that Defendant's wife became aware of the remarks at the Parmenter sentencing in 2011. Additionally, a review of Parmenter's sentencing transcript proves that Defendant's wife testified at Parmenter's sentencing stating her husband was not guilty of the crimes in the above captioned matter. The four-year delay in raising the issue with the Court is unexplained, and, evidence that Defendant was not diligent in pursuing his claim.

Furthermore, upon review of the sentencing transcript of Eugene Parmenter, CP-41-CR-0000786-2011, 11/16/2011, Parmenter's wife testified: **When [M.P.] was 11 she was molested by a friend's father [Defendant]. N.T., 11/16/2011, at 22.** Mrs. Parmenter did not make the statement alleged in Defendant's PCRA petition.

Defendant's wife testified at Parmenter's sentencing: "Mr. Parmenter and Mrs. Parmenter are the parents of my husband's first victim [M.P.]. Id. at 31. She went on to say, however, "So what I am saying, your Honor, and I want this on a public document, is that my husband served time for a sentence that I know that he did not commit that assault against [M.P.]". If there were any question that the sentencing of Eugene Parmenter exculpated the Defendant in the above captioned matter, Defendant would have needed to bring it to the Court's attention within sixty (60) days, which he did not.

III. Conclusion

After conducting an independent review, this Court finds that the Defendant's petition is untimely. In addition, he has not proven an exception to the PCRA time-bar. Therefore, this Court does not have jurisdiction over the petition.

ORDER

AND NOW, this 8th day of November, 2016, it is hereby ORDERED and DIRECTED as follows:

1. Defendant is hereby notified pursuant to Pennsylvania Rule of Criminal Procedure No. 907(1), that it is the intention of the Court to dismiss his PCRA petition unless he files an objection to that dismissal within twenty (20) days of today's date.

2. The application for leave to withdraw appearance filed May 2, 2016, is hereby GRANTED and Matthew Slivinski, Esq. may withdraw his appearance in the above captioned matter.

BY THE COURT,

Nancy L. Butts, President Judge

cc: Matthew Slivinski, Esq.
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